BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BOB DER-CHYUAN CHAO	)	
Claimant	)	
	)	
VS.	)	
	)	
HY VEE FOOD STORES, INC.	)	
Respondent	)	Docket No. 1,016,466
	)	
AND	)	
	)	
ONE BEACON INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent requested review of the December 21, 2005 Award by Administrative Law Judge (ALJ) Robert H. Foerschler. The Appeals Board (Board) placed this matter on its summary docket as of March 3, 2006.

APPEARANCES

Robert B. VanCleave, of Overland Park, Kansas, represents, the claimant. Mark E. Kolich, of Lenexa, Kansas, represents the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ awarded claimant a 10 percent permanent partial impairment to the whole body as a result of his work-related injury. For whatever reason, the ALJ failed to comment on claimant's request for the outstanding medical bills to be paid.

Respondent appeals this Award alleging the ALJ erred in concluding claimant timely presented a written claim as required by K.S.A. 44-520a. Based upon this alleged failure,

respondent contends the claimant's claim is not compensable. Alternatively, if the Board finds this claim compensable, respondent further contends claimant's complaints are the result of age-related conditions and not due to his 2001 work-related injury.

Claimant asserts that his claim is timely. He first argues that he was never advised that respondent was no longer willing to provide medical treatment until after he filed his claim with the Division of Workers Compensation. Thus, any statute of limitation is tolled. Claimant next argues that his injury continued once he returned to work. Thus, he maintains the statute of limitations did not begin to run until he stopped working. Claimant cites *Treaster*[1] in support of this contention.

Claimant also argues he is entitled, at a minimum, to a 13 percent permanent partial impairment along with the payment of his outstanding medical bills as itemized on the listing presented at the regular hearing.

The issues to be determined in this appeal are as follows:

1. Did claimant file a timely written claim?; and if so,
2. The nature and extent of claimant's impairment; and
3. Whether the medical bills attached to the regular hearing transcript are to be paid as authorized or unauthorized.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs, the Board makes the following findings of fact and conclusions of law:

Claimant injured his back in a compensable accident on March 26, 2001.[2] Respondent concedes no accident report was filed for this event. Claimant sought treatment the following day at Overland Park Regional Medical Center where numerous x-rays were taken. He was thereafter referred to an occupational health facility where he was treated by Dr. Bradley A. Breeden. Claimant's treatment consisted of conservative measures including medication, physical therapy and time off work. Claimant was released to return to modified duty on May 2, 2001, and then to full duty on June 12, 2001. Dr.

---

[1] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

[2] The date of claimant's accident was either March 26 or 27, 2001. Regardless of the date, the accident is admitted.

Breeden released claimant from medical care on June 13, 2001, with the recommendation that he be seen by Dr. Michael Poppa "for [an] IME and final rating."[3]

As best as can be gleaned from the record, it does not appear that claimant was actually seen by Dr. Poppa. Claimant's daughter, however, testified that claimant was seen by a "bone specialist" at Menorah Hospital in July or August 2001. No such medical records have been produced, and there is no evidence to suggest that respondent or its carrier paid for any medical treatment from this facility.

Thereafter, claimant received no further treatment until June 30, 2003 when he consulted his family physician, Dr. Liliana E. Nazario. At this point his complaints focused on his back pain. Dr. Nazario deferred any treatment recommendations until she could review the earlier treatment records created by Dr. Breeden.

Claimant returned to see Dr. Nazario on October 21, 2003. She diagnosed "low back pain with radiculopathy" and recommended a MRI. Claimant did not immediately return to Dr. Nazario following that MRI.

At respondent's request, claimant was seen by Dr. Chris D. Fevurly on April 5, 2004. Dr. Fevurly offered no treatment recommendations as he believed claimant was at maximum medical improvement.

On April 20, 2004, claimant filed an application for hearing. At his lawyer's direction, claimant was evaluated by Dr. Nicholas U. Ahn on July 19, 2004. Following his evaluation, Dr. Ahn recommended surgery. Claimant apparently refused to have surgery and when asked to provide a rating, Dr. Ahn indicated that claimant has a 13 percent permanent partial impairment to the whole body based upon the criteria set forth in the A.M.A. *Guides*.[4]

Claimant was also evaluated by Dr. Jeffrey T. MacMillan at respondent's request. Dr. MacMillan ordered an EMG which suggested the possibility of a mild lumbar radiculopathy. He then recommended a myelogram, but claimant decided against that procedure. On June 27, 2005 claimant, through his daughter, requested Dr. MacMillan release him from his care so that he could pursue treatment elsewhere. Dr. MacMillan assigned a 10 percent permanent impairment based upon a 5 percent impairment to the cervicothoracic area and a 5 percent impairment to the lumbar spine. However, Dr. MacMillan indicated he believed the vertebral impairment is the result of age-related degenerative changes.

---

[3] Stipulation for Admission of Evidence (Nov. 22, 2005) (Dr. Breeden's Jun. 13, 2005 medical record).

[4] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment*, (4th ed.). All references are to the 4th ed. of the *Guides* unless otherwise noted.

Claimant has since left his position with respondent and is not working anywhere. He has traveled to Taiwan for treatment and upon his return to the United States, continued to receive medications from Dr. Ahn, as respondent was unwilling to approve such expenses.

The ALJ concluded the following:

> Based upon the limited evidence available it is considered that under the "totality of circumstances" in this case . . . the continuity of Mr. Chao's problems render the defects of any claim for compensation unimportant . . .[5]

He went on to award a 10 percent functional impairment of the body as a whole.

The threshold issue to determine is whether claimant filed a timely written claim. K.S.A. 44-520a(a) provides for written claim to be served within 200 days of the accident date. Under certain circumstances, the time period for serving written claim upon the employer may be extended to one year. K.S.A. 44-557(a) requires every employer to report accidents of which it has knowledge within 28 days of receiving such knowledge. Subsection (c) of K.S.A. 44-557 provides:

> (c) No limitation of time in the workers compensation act shall begin to run unless a report of the accident as provided in this section has been filed at the office of the director if the injured employee has given notice of accident as provided by K.S.A. 44-520 and amendments thereto, except that any proceeding for compensation for any such injury or death, where report of the accident had not been filed, must be commenced by serving upon the employer a written claim pursuant to K.S.A. 44-520a and amendments thereto within one year from the date of the accident, suspension of payment of disability compensation, the date of the last medical treatment authorized by the employer, or the death of such employee referred to in K.S.A. 44-520a and amendments thereto.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.[6] The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.[7] Written claim is, however, one step beyond notice in that an intent to ask the employer to pay compensation is required.

Here the ALJ apparently thought the "defects", or more properly termed, the delay in claimant asserting his claim as "unimportant". The Board disagrees.

---

[5] ALJ Award (Dec. 21, 2005) at 5.

[6] *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

[7] *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

In Kansas, an injured worker must satisfy the trinity of timely notice of accident, timely written claim and timely application for hearing in order to maintain the claim for workers compensation benefits. No proceedings for benefits shall be maintainable if the injured worker fails to timely satisfy the requirements of any one of the three.

When the time for filing a claim for compensation has passed the right to recover is lost and cannot be revived.[8] Moreover, a claim once barred due to the running of the statute of limitations cannot be revived even by subsequent voluntary payments of compensation by the employer.[9]

The statute requires the timely assertion of a claim and does not provide for discretion to disregard its requirements. Here, the respondent did not file any accident report and therefore any written claim must have been filed within one year of the date of accident, March 26, 2001, or the suspension of compensation or the last date of medical treatment authorized by respondent. The only document that claimant maintains satisfies the written claim requirement is the E-1 document filed with the Division on April 20, 2004. That date is obviously well past the 1 year time period given claimant's date of accident. Thus, claimant has failed to meet the statutory requirements and the ALJ's Award must be reversed.

Although claimant argues that the statute of limitations is tolled because his client was never disabused of his right for treatment, the Board is not persuaded. While the law requires an employer to disabuse an employee of an employer's willingness to provide authorized treatment[10] in order to assert a defense of timely claim, that duty only arises when the employee is receiving treatment or has a reasonable expectation that additional treatment is contemplated in the future. In this instance, Dr. Breeden released claimant from treatment and referred him to Dr. Poppa for a rating. It is unclear from the record why that next step was not taken. Based upon the evidence offered by the parties, Dr. Breeden's visit is the last authorized medical treatment. There is no evidence that the visit with a "bone specialist" was authorized or paid for by respondent. Likewise, the record fails to establish that claimant thereafter requested or sought additional treatment for his injury for almost another two years. And then he sought treatment with the practitioner of his choice and not with an authorized physician.

Based upon these facts, the Board finds that the statute of limitations was not tolled. Respondent had no duty to disabuse claimant of anything as he did not appear to have any expectation of future treatment. Instead it appears claimant believed he was not in need

---

[8] *Graham v. Pomeroy*, 143 Kan. 974, 57 P.2d 19 (1936).

[9] *Solorio v. Wilson & Co.*, 161 Kan. 518, 169 P.2d 822 (1946).

[10] See *Shields v. J.E. Dunn Construction Company*, 24 Kan. App.2d 382, 946 P.2d 94 (1997).

of or entitled to any additional authorized treatment. Accordingly, claimant's April 20, 2004 filing is out of time. The ALJ's Award is, therefore, reversed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated December 21, 2005, is reversed as it relates to the compensability of claimant's claim. Respondent is, however, assessed the costs associated with the June 21, 2005 Regular Hearing.

IT IS SO ORDERED.

Dated this _____ day of April, 2006.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Robert B. VanCleave, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director